Hjh Maria @ Maryati bt Dalle (t/a Melati Kontraktor) v Majlis Perbandaran Tawau

HIGH COURT (TAWAU) — CIVIL SUIT NO T(22)4 OF 2009
DOUGLAS SIKAYUN JC
27 MAY 2011

Contract — Damages — Assessment — Order of assessment — Appeal against award of damages — Whether plaintiff had proven damages claimed — Whether plaintiff entitled to nominal damages

The principal business of Hjh Maria @ Maryati bt Dalle trading as Melati Kontraktor ('the plaintiff') was grass cutting. The plaintiff, who entered into a ten year service contract ('the service contract') with the Majlis Perbandaran Tawau ('the defendant'), claimed that the untimely termination of the service contract by the defendant had caused it to suffer loss and damage. This led to the plaintiff filing an action against the defendant for damages followed by an application for summary judgment pursuant to O 14 of the Rules of the High Court 1980. The plaintiff succeeded in obtaining summary judgment and was also awarded damages of RM2,750,199.20 by the senior assistant registrar ('the SAR') who heard the assessment of damages. Dissatisfied with the decision of the SAR, the defendant filed the present appeal. It was the defendant's case that at the time when the plaintiff was awarded the service contract by the defendant, the plaintiff's husband, Alizaman bin Jijurahman ('Alizaman'), was a member of the defendant council and that he was fully aware of the defendant's financial constraints. The defendant submitted that Alizaman used his position as a councilor of the defendant council to secure the service contract for the plaintiff and that none of this evidence pertaining to this matter came to light because of the plaintiff's objection and the SAR sustaining this objection. The principal issue to be determined in this appeal was whether the plaintiff had proven the damages she was claiming.

Held, setting aside the SAR's order, awarding the plaintiff nominal damages of RM1,000 and ordering each party to bear its own costs:

(1) Although evidence was adduced to state that it was Hjh Maria @ Maryati bt Dalle who executed the service contract with the defendant, all other documents and correspondences between the plaintiff and the defendant were signed by her as the manager of the plaintiff firm and not as the proprietress. Alizaman who also claimed to be the manager of the plaintiff firm was unable to satisfactorily explain this discrepancy. Further, Hjh Maria @ Maryati bt Dalle was not called to give evidence as

to how the service contract was secured, the number of workers she employed, the expenditure on salaries of staff, payment of EPF contributions and the like. Instead it was her husband Alizaman who gave evidence in her place. In the circumstances, it was held that for all intents and purposes Hjh Maria @ Maryati bt Dalle was the proprietress of the plaintiff firm in name only and that the plaintiff firm actually belonged to and was controlled by Alizaman (see para 44).

(2) It is trite law that the plaintiff had the burden of proving both the fact and the amount of damages before she can recover. If she proves neither, the action will fail or she will be awarded only nominal damages upon proof of the contravention of a right. In the present case only Alizaman and the plaintiff's accountant and tax agent were called to prove that the plaintiff had suffered loss and damage. Both the tax agent and Alizaman had calculated the plaintiff's damages as RM3,686,269.70, by using the net income derived for 2008-2009, ie RM35,444.90, and multiplying that by the remaining unexpired term on the service contract (104 months). This was a very simplistic approach that took no consideration of the increase in wages, inflation, prices of fuel, cost of machine and spare parts. In fact the plaintiff had not provided any evidence of any projection of future loss or profits to justify its claim. As the plaintiff had failed to prove the loss as claimed, the court awarded it nominal damages of RM1,000 (see para 41).

(3) The court found that the SAR had not directed her mind to the legal burden cast on the plaintiff to prove the loss and thus set aside her order of assessment (see para 79).

[Bahasa Malaysia summary

Perniagaan utama Hjh Maria @ Maryati bt Dalle berniaga sebagai Melati Kontraktor ('plaintif') adalah memotong rumput. Plaintif, yang memasuki kontrak khidmat selama sepuluh tahun ('kontrak khidmat') dengan Majlis Perbandaran Tawau ('defendan'), mendakwa penamatan bukan pada waktunya oleh defendan telah menyebabkan ia mengalami kerugian dan ganti rugi. Ini membawa kepada plaintif memfailkan tindakan terhadap defendan untuk ganti rugi diikut dengan permohonan untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980. Plaintif berjaya dalam memperolehi penghakiman terus dan juga diawardkan ganti rugi sebanyak RM2,750.199.20 oleh timbalan kanan pendaftar ('TKP') yang mendengar penaksiran ganti rugi. Tidak puas hati dengan keputusan TKP, defendan memfailkan rayuan ini. Adalah kes defendan bahawa pada masa plaintif diawardkan dengan kontrak khidmat tersebut oleh defendan, suami plaintif, Alizaman bin Jijurahman ('Alizaman'), adalah ahli majlis defendan dan bahawa dia mengetahui mengenai kekangan kewangan defendan. Defendan berhujah bahawa Alizaman menggunakan kuasanya sebagai ahli majlis defendan untuk mendapatkan kontrak khidmat untuk plaintif dan tidak satupun keterangan

berkaitan perkara ini berbangkit disebabkan bantahan plaintif dan TKP mengekalkan bantahan ini. Isu utama untuk ditentukan dalam rayuan ini adalah sama ada plaintif telah membuktikan ganti rugi yang didakwa olehnya.

Diputuskan, mengenepikan perintah TKP, mengawardkan plaintif ganti rugi nominal sebanyak RM1,000 dan memerintahkan setiap pihak menanggung kosnya sendiri:

(1) Walaupun keterangan dikemukakan untuk menyatakan bahawa Hjh Maria @ Maryati bt Dalle yang melaksanakan kontrak khidmat dengan defendan, kesemua dokumen lain dan surat menyurat di antara plaintif dan defendan ditandatangani olehnya sebagai pengurus firma plaintif dan bukan sebagai tuan punya. Alizaman yang juga mendakwa sebagai pengurus firma plaintif tidak dapat menjelaskan dengan memuaskan percanggahan ini. Selanjutnya, Hjh Maria @ Maryati bt Dalle tidak dipanggil untuk memberi keterangan bagaimana kontrak khidmat tersebut diperolehi, bilangan pekerja-pekerja yang dia gajikan, perbelanjaan atas gaji pekerja, bayaran sumbangan KWSP dan lain-lain lagi. Sebaliknya suaminya Alizaman yang memberi keterangan bagi pihaknya. Dalam keadaan ini, ia diputuskan bahawa untuk kesemua niat dan tujuan Hjh Maria @ Maryati bt Dalle adalah tuan punya firma plaintif dalam nama sahaja dan bahawa firma plaintif sebenarnya dimiliki dan dikawal oleh Alizaman (lihat perenggan 44).

(2) Adalah undang-undang nyata bahawa plaintif mempunyai beban untuk membuktikan kedua-dua fakta dan jumlah ganti rugi sebelum dia boleh mendapatkan semula. Jika dia tidak membuktikan kedua-duanya, tindakan akan gagal atau dia akan diawardkan dengan hanya ganti rugi nominal atas bukti melanggar hak. Dalam kes ini hanya Alizaman dan akauntan plaintif dan ejen cukai dipanggil untuk membuktikan yang plaintif telah mengalami kerugian dan ganti rugi. Kedua-dua ejen cukai dan Alizaman telah mengira ganti rugi plaintif sebagai RM3,686,269.70, dengan menggunakan pendapatan bersih yang berasal untuk tahun 2008–2009, iaitu RM35,444.90, dan mendarabkan ia dengan tempoh kontrak khidmat yang belum tamat (104 bulan). Ini adalah pendekatan yang ringkas yang tidak mengambil kira kenaikan gaji, inflasi, harga minyak, kos mesin dan bahagian-bahagian ganti. Sebenarnya plaintif tidak memberikan apa-apa keterangan mengenai apa-apa unjuran kerugian masa depan atau keuntungan untuk menjustifikasikan tuntutannya. Memandangkan plaintif gagal untuk membuktikan kerugian seperti yang didakwa, mahkamah mengawardkannya dengan ganti rugi nominal sebanyak RM1,000 (lihat perenggan 41).

(3) Mahkamah mendapati bahawa TKP tidak mempertimbangkan beban

undang-undang yang terletak di atas plaintif untuk membuktikan kerugian dan oleh itu mengenepikan perintah penaksiran (lihat perenggan79).]

Notes

For cases on assessment, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3900–3911.

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd [1948] WN 89 (refd)
Guan Soon Ting Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)
Hadley v Baxendale [1843–60] All ER Rep 461 (refd)
Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd [1995] 1 MLJ 214, HC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 AMR 622, CA (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd Ltd [1989] 3 MLJ 360; [1990] 2 CLJ (Rep) 635, HC (refd)

Legislation referred to

Companies Act 1965 s 153(3)(c)
Local Government Ordinance 1961 s 23(3), (9)
Rules of the High Court 1980 O 14

(Amin Jaafar & Co) for the appellant.
(Chin Mirdin & Co) for the respondent.

Douglas Cristo Primus Sikayun JC:

[1] Pursuant to a summary judgment given on 26 October 2009, given by Yang Arif Dato' Rahman Sebli, the learned senior assistant registrar on 23 December 2010 assessed the damages suffered by the respondent/plaintiff. An award of RM2,750,199.20 with statutory interests at 8%pa from date of judgment to date of realisation.

[2] Dissatisfied with the decision of the learned senior assistant registrar, the appellant/defendant filed their notice of appeal to judge in chambers under encl 43. This is the matter now before me.

[3] I have read the notes of proceedings before the learned senior assistant registrar including the written witnesses' statements and the submissions of both parties. I have also heard the arguments of both counsel who appeared before me and read their written submissions. Further I have gone through the O 14 application and read the various affidavits.

[4] The parties to this suit/appeal are as follows: A

(a) Hjh Maria @ Maryati bt Dalle (trading as Melati Kontraktor) as the plaintiff/respondent;

(b) and Majlis Perbandaran Tawau as the defendant/appellant.

B

[5] The descriptive words above shall be used inter changeably in this ruling.

[6] At p 2 of encl 32 (the agreement dated 26 February 2008) entered between Majlis Perbandaran Tawau and Melati Kontraktor, it is stated that the latter has a registered trading licence No TD 38460. However this trading licence was never produced even at the O 14 stage for some reasons. I am unable to peruse the said licence in order to determine the name of the sole proprietress or the name of the manager if any and current status. Be that as it may the appellant never deny nor raise this issue of non production. The reason why I raised this point is because in many documents Hjh Maria @ Maryati bt Dalle signed as the *pengurus* (see pp 17–98 on monthly claims submitted by the plaintiff of encl 32). C D

[7] But in the *penyata kewangan* 2008 prepared by PW2 Freddy Jailani, Hjh Maria @ Maryati bt Dalle is the sole proprietress of the firm Melati Kontraktor. E

[8] During the assessment of damages before the learned senior assistant registrar what is of significant interest to this court is the non-appearance of the plaintiff herself ie Hjh Maria @ Maryati bt Dalle to give evidence. F

[9] Instead the main witness was one Alizaman bin Jijurahman NRIC No 570425–12–5267 who claimed to be the manager of the plaintiff's firm and more importantly the husband of Hjh Maria who said that she gave him the authority to represent her in giving evidence in court. G

[10] The other witness being PW2 Freddy Jailani, a tax accountant or tax agent.

[11] During the assessment of damages counsel for the plaintiff was at pains to deny and prevent the defendant's counsel from adducing evidence to show that Alizaman bin Jijurahman was a councilor of the Tawau Municipal Council. He claims that this goes to the merits of the case and has no relevance in assessing the damage. However this I believe is a significant fact to take into consideration when one assesses the damages because of the possible issue of 'unjust enrichment'. Note that the defendant had alleged that at that material time Alizaman was indeed a member of the Tawau Municipal Council and he was alleged to be fully aware of the financial constraint faced by the defendant (see encl 13 para 2(ii)). The fact that the plaintiff's husband is also the manager H I

of the plaintiff's firm was also not denied by Hjh Maria @ Maryati bt Dalle in her affidavit affirmed on 3 September 2009 (see encl 15). It is trite law known to all litigation lawyers that, and it is well settled principle governing evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so stated. I so hold it true in this particular case now heard before me.

[12] As far as the evidence adduced in court at the O 14 stage goes, what we have is a situation that at that material time PW1 Alizaman bin Jijurahman was indeed a member of the Tawau Municipal Council ie when the contract to provide a ten year service was entered and signed between the Tawau Municipal Council, the defendant and a firm belonging to his wife Hjh Maria, the plaintiff.

[13] It was further alleged by the defendant that the plaintiff's husband being a councilor was aware of the financial constraints of the Tawau Municipal Council. This was not denied nor rebutted by the plaintiff as stated.

[14] The plaintiff's attempts to prevent the disclosure of this material fact during the assessment of damages speaks volumes of the plaintiff's fears that this disclosure may affect materially the outcome or amount of damages that may be awarded by the senior assistant registrar.

[15] Earlier at line 11 p 6 of notes of proceedings onward, PW1 Alizaman bin Jijurahman was asked whether he has ever been a councilor. The plaintiff's counsel objected saying that there is no relevancy. He said that the proceedings only for assessment of damages, merit has been delivered by the honourable judge. He submitted that they should not go on to the merits.

[16] The appellant's counsel however contended that there are other related issues and related questions on this.

[17] At line 4–10 at p 8 of notes of proceedings, the appellant counsel explained his stand and his exasperation:

> The purpose is to establish the truth. If court not allowing one to ask question, how are we going to submit opposing the Plaintiff's claim. Do we have to accept the plaintiff's claim without examining the basis and how this claim came about? Then just to assess is it reasonable or unreasonable based on documents? Just asking *whether PW1 Alizaman Bin Jijurahman part of the Defendant* when agreement was signed, if the Plaintiff objects, nothing I can say. (Emphasis added.)

[18] Then at line 14–17 the plaintiff's counsel remarked:

Not arguing the claim just assessment for future loss of profit. To establish have the contract obtained in such a manner that the defendant exhorbitant. Defendant's public authority managing public fund. Court duty bound in protecting the public's fund. Plaintiff abusively spend.

[19] At line 14 p 11 notes of proceedings, this question was put to PW1:

14Q: I put it to you that it to that you use your position to secure this contract?

A: No.

[20] From the above line of questioning and arguments, we can discern that it is the defendant's case that PW1 Alizaman bin Jijurahman had used his position as a councilor of the Tawau Municipal Council to secure this contract. And at the time when the contract was secured, PW1 Alizaman bin Jijurahman as a councilor was aware of the financial position of the defendant.

[21] In encl 13 (an affidavit opposing summons for summary judgment affirmed by Aftar Nurajat, secretary of the defendant affirmed on 18 August 2009 and in particular para 4(ii) the deponent stated '… it would have been contrary to regulations for the Defendant to let the Plaintiff continue with the said works despite the Defendant not having the financial allocation for the purpose. *Indeed at the material time the Plaintiffs husband is and was a member of the Tawau Municipal Council and is fully aware of the financial constraint faced by the Defendant.*' (Emphasis added.)

[22] I have read encl 15 (an affidavit in reply by Hjh Maria @ Maryati bt Dalle the plaintiff herself affirmed on 3 September 2009). I have gone through it with a fine tooth comb but was unable to see any averments by the deponent rebutting or denying that her husband at the material time indeed is and was a councilor and was aware of the financial constraints of the defendant then. See the case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 AMR 622.

[23] What purpose did the plaintiff hope to achieve in hiding this fact from the learned senior assistant registrar, when there is clear uncontroverted evidence to prove PW1 Alizaman bin Jijurahman's role in the Tawau Municipal Council and his knowledge of the financial constraints. Surely as a councilor he must know that if there is no financial allocation the defendant is not in a position to pay.

[24] But there is no evidence adduced either at the O 14 stage or at the assessment of damages stage that PW1 Alizaman bin Jijurahman had used his position as a councilor to secure the ten years contract, only that that at the

material time he was and is indeed a councilor who was aware of the financial constraints of the defendant and that the defendant's counsel had suggested that PW1 Alizaman bin Jijurahman had used his position to secure the contract.

[25] As pointed out by the plaintiff, the defendant's counsel in his oral submission raised an issue that the award of the senior assistant registrar of general damages will unjustly enriches the plaintiff at the expense of the public fund managed by the defendant.

[26] This issue of unjust enrichment is connected with PW1 Alizaman bin Jijurahman's position as a councilor of the defendant. But attempts made by the appellant's counsel to question PW1 Alizaman bin Jijurahman on this case was thwarted by objections from the plaintiff's counsel and sustained (wrongly I would say) by the learned senior assistant registrar. But defendant's counsel is not entirely blameless as he should have been aware of encl 13 as it is his document. Had he been aware of it, he could have pursued his line of questioning and relate PW1 Alizaman bin Jijurahman's position as a councilor to that of unjust enrichment or even perhaps possible conflict of interest in view of his wife's interest in Melati Kontraktor and possible infringement of s 23(3) and (9) of the Local Government Ordinance No 11 of 1961. That law imposes a duty to disclose and carry penal provisions for non-disclosure. None of the above came to light because of the plaintiff's objection and the senior assistant registrar sustaining it.

[27] It is to be noted that by virtue of his appointment as a councilor PW1 Alizaman bin Jijurahman is a 'public officer' and is subjected to certain restrictions as imposed by relevant provisions of the law.

[28] This issue of unjust enrichment is a point not canvassed before the senior assistant registrar. But where interest of justice so requires, the governing principle is that the appellate court will permit a new point to be raised for the first time. The High Court still retains a discretion to hear issues or points of law when they were not raised at first instance.

[29] Neither did the defendant's counsel complained that the learned senior assistant registrar's decision to disallow his questions pertaining to PW1 Alizaman bin Jijurahman's status as a councilor is wrong.

[30] Nevertheless I have the discretion to look into these two matters in the interest of justice.

[31] Any evidence including documents adduced in the trial proper is relevant and can be used in a subsequent proceeding such as during assessment for damages.

[32] I note how PW1 Alizaman bin Jijurahman deliberately avoiding answering questions related to his position at lines 11–15 at p 5 of notes of proceedings:

> 11. Q: What did you do before holding the post of Manager in Melati Kontraktor?
>
> 12. A: Actually, I've also tried to get any contract but there is no guarantee that you can obtain it.
>
> 13. Q: What did you do for a living before becoming a Manager in Melati Kontraktor?
>
> 14. A: I've tried to get any contract.

[33] I now refer to the plaintiff's bundle of document at pp 189–191 (encl 32). This is the agreement dated 1 April 2008 entered between Jhin Huat Plantations Sdn Bhd. As the landlord and Alizaman bin Jijurahman trading as Melati Kontraktor as the tenant.

[34] At p 2 lines 8–10 of notes of proceedings, PW1 Alizaman bin Jijurahman said he signed the agreement on behalf of Melati Kontraktor.

[35] In his own written witness statement PW1 Alizaman bin Jijurahman refers Melati Kontraktor as 'my company' throughout without any qualification (encl 34). He never mention that his wife Hjh Maria @ Maryati bt Dalle as the sole proprietress of the plaintiff's firm. He only said that he is the husband of Hjh Maria @ Maryati bt Dalle, the plaintiff in this case.

[36] However, at p 9 line 5 of the notes of proceedings, PW1 Alizaman bin Jijurahman denied that he is the proprietor of Melati Kontraktor.

[37] In my view, the details contained in the plaintiff's bundle of documents (encl 32) found at pp 189–191 and PW1 Alizaman bin Jijurahman's own written witness statement (encl 34) speak for themselves; ie that PW1 Alizaman had passed himself off to the landlord Jhin Huat Plantation Sdn Bhd that he was the principal and he was trading under the name and style of Melati Plantation Sdn Bhd.

[38] Even if that tenancy agreement was prepared by the landlord and had contained inaccurate details, PW1 Alizaman bin Jijurahman could have corrected them, but he did not. Further in a document which was used in court ie encl 34, he represented in court that Melati Kontraktor is 'his company'.

[39] Evidence was adduced in court to state that it was Hjh Maria @ Maryati

bt Dalle who executed the 26 February 2008 agreement with the defendant. But all other documents and correspondence between the plaintiff and defendant were signed by Hjh Maria @ Maryati bt Dalle as the manager of the plaintiff's firm and not as the proprietress. This was not satisfactorily explained by PW1 Alizaman bin Jijurahman because PW1 Alizaman bin Jijurahman also claim to be the manager.

[40] Given the above, I have no doubt and I do so hold that for all intents and purpose Hjh Maria @ Maryati bt Dalle is the proprietress of Melati Kontraktor *in name only*. It actually belongs to PW1 Alizaman bin Jijurahman and he controls it. Given the fact that evidence was not fully adduced in court, I make no finding on the issue of unjust enrichment or whether PW1 Alizaman bin Jijurahman had a role to play in inducing the defendant to enter into the agreement with the plaintiff, and whether PW1 Alizaman bin Jijurahman had disclosed his interests.

[41] However despite my observation and finding above, the real and overriding question is whether the plaintiff have proven her damage. It is trite law that the plaintiff has the burden of proving both the fact and the amount of damages before she can recover. If she proves neither the action will fail, or she will be awarded only nominal damages upon proof of the contravention of a right.

[42] The plaintiff produced two witnesses to prove their loss and damage caused by the untimely termination of the ten year service contract namely PW1 Alizaman bin Jijurahman, the purported manager of the plaintiff's firm and a tax agent/accountant PW2 Freddy Jailani.

[43] The plaintiff did not call Hjh Maria @ Maryati bt Dalle to the stand to give her evidence. The plaintiff is within her rights not to give evidence and subject herself to cross-examination.

[44] However, as the sole proprietress of the plaintiff's firm one would expect that she would be called to give evidence as she is the principal. After all the firm belonged to her and she knows the inimate details on how the contract of ten years was secured, the number of workers she employed, the expenditure on salaries of employed staff, contract labourers outgoings such as rental, payment of EPF contributions, SOCSO and the like. Instead it was PW1 Alizaman bin Jijurahman (her husband) who gave evidence in place.

[45] From the cross-examination of PW1 Alizaman bin Jijurahman by the counsel for the defendant, it was suggested that the plaintiff do not have, possess or own amongst other things, the necessary manpower, the grass cutting equipment and vehicles that she can call her own.

[46] In fact it was put to PW1 Alizaman bin Jijurahman that the workforce of 15 Indonesian workers including one Damianus Vinsin were in fact contract labourers who were paid RM16,904.46 in one lump sum every month. At p 234 of the plaintiff's own bundle of documents under 'perbelanjaran Am dan Pentadbiran', listed under 'Buruh Kontrak' is the payment of RM16,904.46 whereas the amount for 'gaji dan upah' was only RM6,300 and gaji *pengurus* as RM20,000. The amount is for the year ending 31 December 2008.

[47] For January to end of June 2009 those figures can be found at p 216 (encl 32). From the particulars found at pp 216 and 234, it is clear that Damianus Vinsin and the rest of the 14 men are not workers of the plaintiff. Damianus Vinsin was paid in one lump sum of RM16,9044.46 every month. No salary voucher for each individual person, and there were 15 of them, were produced in court to prove that they are paid employees of the plaintiff.

[48] Hence the only conclusion to draw is that all 15 were indeed not employees of the plaintiff but Indonesian contract workers and their leader was Damianus Vinsin.

[49] This further reinforced by the fact the 20 units of grass cutters purportedly purchased by the plaintiff actually do not belong to the plaintiff but to the grass cutters themselves. At line 9 p 8 during cross-examination PW1 Alizaman bin Jijurahman answered as follows:

> 8A: The purchase receipts are prepared by our workers. The purpose is for the Company to make payment for it by deducting the workers' salary every month and the workers can take good care of the machines and for the purpose of reducing the company's costs for repairs.

[50] In short what it really meant is that the workers will have to pay for the machines by way of monthly deductions. Hence, at the end of the day the plaintiff do not actually own these machines. They never had any, in fact.

[51] I now refer to A17 of PW1 Alizaman bin Jijurahman's witness statement.

[52] The main expenditure incurred by his company in carrying out the works under the agreement include the salary of labour workers, staff salary, salary of manager, office rental, electricity and water and other administration fees.

[53] Under *perbelanjaan am dan pentadbiran* (see p 197 and 216 for 2008 and 2009 of encl 32) I cannot find any expenditure for fuel for the grass cutters,

lubricant, maintenance and repair of those machines, costs of spare parts and cost of transportation for the workers to their work place.

[54] The above are operating costs that will have to be taken into consideration when computing the nett income. Yet they are all unaccounted for. There is no explanation why these items are not included either by PW1 Alizaman bin Jijurahman or by PW2 Freddy Jailani the accountant.

[55] They only logical explanation one can reasonably arrive at, would be that all the above costs are borne by Damianus Vinsin and his men. And that would mean that clearly Damianus Vinsin and his men are subcontractors who were responsible for their own grass cutters and that they have to provide their own fuel and spare parts.

[56] There is no indication that PW1 Alizaman bin Jijurahman had purchased several units of grass cutting machines and implements despite PW1 Alizaman bin Jijurahman assertion that they did buy (see line 12 p 4 of notes of proceeding). His assertion that they did buy grass cutters is not reflected or corroborated by his own financial documents.

[57] In so far as vehicles are concerned, PW1 Alizaman bin Jijurahman acknowledge that the plaintiff had none (see line 12 p 4 of notes of proceedings).

[58] So what capital expenditure did the plaintiff incur or continue to suffer?

[59] They cannot argue and rely on the tenancy agreement. No evidence was adduced that the landlord Jhin Huat Plantations Sdn Bhd has commenced any action against Melati Kontraktor.

[60] Further no evidence was adduced to the effect to that Damianus Vinsin and 14 others have commenced action for terminating their services as grass cutters.

[61] So what loss or damage has the plaintiff suffered that she wanted the defendant to pay and compensate the plaintiff?

[62] Before we go into details on the evidence adduced by the plaintiff on the assessment of damages, I would like to re state the law on loss and damages. For this I need not go further that to quote justice Datuk David Wong's judgment in K22–114 of 2008 *Nordin Abdul Rahman vs Eramaz (M) Sdn Bhd and 2 others* at the Kota Kinabalu High Court:

Loss and Damages:

It is trite law that the plaintiff must prove its loss and damages before the court can award them. What that means is succinctly set our Lordship Datuk Charles Ho J in *Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd* [1995] 1 MLJ 214 at p 235 and at pp 101–102 of PBOA that:

It is settled law where a plaintiff brings an action for damages, he must prove it. Before he can recover, he has to discharge the burden of proving both as to the fact of damage and as to the amount. The authority for this is *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 2 ML J 99 at p 100 where Ong Hock Thye FJ, delivering the judgment of the Federal Court, said:

The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in Mayne & McGregor on *Damages* (12th Ed) para 174. For its practical application, I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) WN 89:

… plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, 'This is what I have lost; I ask you to give me these damages'. They have to prove it.

The only evidence called by the plaintiff to prove damage is the bare statement by PW1 in court …

Thus, the plaintiff has not introduced any evidence to prove the amount of damages and the figures stated by the plaintiff in Schs I and II have not been substantiated. Applying the principles enunciated in *Guan Soon Ting Mining Co v Wong Fook Kum* [1969] 1 MLJ 99, the plaintiff, if it succeeds in the present action would, to my mind, only be entitled to an award of nominal damages.

[63] Another case of high authority is the case of *Popular Industries Ltd v Eastern Garment Manufacturing Co Sdn Bhd* [1990] 2 CLJ (Rep) 635 where His Lordship Edgar Joseph Jr (as he then was) said:

I was turn to consider the crucial question: have the plaintiffs proved their claim for damages as alleged or at all?

With regard to this part of the case, I would preface what I have to say by referring to certain well established principles.

It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.

> On the question of the quality of evidence expected of a plaintiff it is well to remember what Devlin J said in *Biggin v Permanite* [1951] 1 KB 422, 423 namely, 'where precise evidence is obtainable, the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof' (see *Aerial Advertising Co v Batchelors Peas* (1938) 2 All ER 788m 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* (1971) WLR 1731 (CA) in which the plaintiff claiming for diminution of profits of his one man business failed in his claim even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given (see para 345 *McGregor on Damages*, (15th Ed)).

[64] Counsel for the plaintiff refers the court the case of *Hadley* and *Baxendale* where the court held as follows:

> When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably considered either arising naturally, ie according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it …

[65] I have no issue of the principle stated there but what remains to be done by the plaintiff is to prove the loss and damages suffered by him. His claim is RM1,519,980.48 'being 12% of the value of the project which otherwise he could have earned should he be allowed to take over and implement the project in accordance with the agreement'. The only witness called to prove that the loss and damages from such project was the plaintiff himself. Though there is no law to prohibit the court from believing an interested witness like the plaintiff here, the reality is that the plaintiff himself merely states in his statement — 'I have suffered loss of expected profits in the sum of about of RM1,519,980.48 which is about 12% of the value of the project which otherwise he could have earned should he be allowed to take over and implement the project in accordance with the agreement'. He never explained how and by what manner the figure of 12% was arrived at. No particulars were produced in court. With respect the plaintiff should have produced a report of an independent quantity surveyor stating out the profit projection of the Lahad Datu project and setting out in details the manner in which that projection was arrived. That independent quantity surveyor should also be a witness in the court explaining in details how that report was prepared. Without such report or information before me, I can only speculate which I am allowed to do so by

law. However, there is enough evidence before me to make a reasonable award in the sum of RM100,000 being costs incurred by the plaintiff in respect of the Lahad Datu project.

[66] We shall now apply that case to our present suit.

[67] I ask the question: Have the plaintiff prove her claim that she is entitled to the award of RM2,750,199.20 plus interest and cost, as awarded by the learned senior assistant registrar?

[68] As stated earlier two witnesses were produced by the plaintiff to give evidence on the assessment of damages.

[69] PW2 Freddy Jailani is a tax agent authorised by his appointment under s 153(3)(c). He is authorised to prepare as a tax agent only for sole proprietorship and partnership but not those registered under the Companies Act 1965. His score of work is limited only to those that is being permitted under the law.

[70] He prepared the tax assessment for Melati Kontraktor for 2008–2009 and did not have the benefit of referring to Melati's business activities for the previous accounting years. See line 4–5 p 14 of notes of proceedings. But under re-examination PW2 Freedy Jailani stated that before 2008 and 2009 he was the accountant who prepared the account of Melati Kontraktor. Unfortunately PW2 Freddy Jailani did not say when or for what years he prepared the accounts of Melati Kontraktor. Be that as it may we shall rely only on documents produced in court. Since it was claimed that prior to 2008 and 2009 PW2 Freddy Jailani was the accountant who prepared the reports for Melati Kontraktor, he should have produced those reports. This will give us a fair idea as to income of the plaintiff and the type of business it was involved in and average out the income.

[71] As the plaintiff's accountant and tax agent PW2 Freddy Jailani must know the type of business the plaintiff was in. He must have known that the principal business was grass cutting. Yet we do not see any purchase of the grass cutters or any provisions made for operating costs such as fuel.

[72] PW2 Freddy Jailani testified that he prepared the financial accounts based on the documents provided for by the plaintiff. Hence he cannot vouch for the authenticity or accuracy of those documents.

[73] PW1 Alizaman bin Jijurahman gave evidence (see line 7–9 at p 2 of notes of proceeding) that the unexpired term runs to 104 months and based on

an income of RM35,444.90, the income that the plaintiff could have earned would amount to RM3,686,269.70. And that was the amount that the plaintiff was seeking for. That was the true extent of his evidence.

[74] PW1 Alizaman bin Jijurahman said he was the manager of plaintiff since 1 March 2008 to June 2009 (see line 7 at p 6 of notes of proceeding).

[75] PW2 Freddy Jailani did not give any projection report or any separate independent report that this court can rely on to justify the respondent's claim on the damages. What PW2 Freddy Jailani and PW1 Alizaman bin Jijurahman had done was to use the nett income derived for 2008–2009 and multiply it by the remaining unexpired term. This is a very simplistic approach. It is too rudimentary. It took no consideration for the increase of wages, inflation, prices of fuel, cost of machine and spare parts.

[76] Any projection of future loss or profits is the realm of public or chartered accountants or valuation experts. Parry's 'Valuation Tables' (used by valuers) should be used in computing the 'years purchase' or the accountants' use of the 'present value at a discounted rate' principle. Discounts or rebate must be given simply because the claimant will be rewarded in one lump sum payment now for the loss that he hoped to get or earn in future. Any future loss payable now is subject to discount. But none of these evidence were made available to the court.

[77] This court should not be left to speculate on what the amount should or should not be. The burden is on the plaintiff to prove.

[78] We should be mindful of what Chief Justice Lord Goddard said in *Bonham-Carter v Hyde Park Hotel* [1948] WN 89:

> … the plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court saying 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[79] I have read the ruling of the learned senior assistant registrar. I find that she has not directed her mind to the legal burden cast on the plaintiff to prove the loss. She should have applied the legal principles enunciated in the cases such as *Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd* [1995] 1 MLJ 214, *Popular Industries Ltd v The Eastern* [1990], *Guan Soon Ting Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 and *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89.

[80] What PW1 Alizaman bin Jijurahman had done was exactly what Lord

Goddard had envisaged in *Bonham-Carter*'s case. PW1 Alizaman bin Jijurahman said that his nett income is RM35,444.90 x 104 months. Therefore he is entitled to RM3,686,269.70. The learned senior assistant registrar later reduced it to RM2,750,199.20.

[81] I find that the plaintiff has fallen short of the legal requirements to prove her loss and therefore rule that the plaintiff have failed to prove the loss as claimed.

[82] I therefore set aside the learned senior assistant registrar's order of assessment of RM2,750,199.20 given 23 December 2010 and award nominal damage of RM1,000. Normally costs will follow the event but due to the unsatisfactory nature on how this case was conducted I order each party to bear its own cost here and below.

[83] Order accordingly.

SAR's order set aside, plaintiff awarded nominal damages of RM1,000 and each party ordered to bear its own costs.

Reported by Kohila Nesan